UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#44

CIVIL MINUTES - GENERAL

Case No.	EDCV 13-1961 PSG (DTBx)	Date	July 30, 2014
Title	Maria Ford v. Gary Yasuda, *et al.*		

Present:	The Honorable Philip S. Gutierrez, United States District Judge	
Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings: (In Chambers) Order GRANTING IN PART and DENYING IN PART Defendants' Motion to Dismiss

Before the Court is Defendants' motion to dismiss the First Amended Complaint. Dkt. # 44. The Court held a hearing regarding this matter on July 28, 2014. Having considered the arguments in the moving, opposing, and reply papers, as well as the arguments at the July 28, 2014 hearing, the Court GRANTS the motion IN PART and DENIES the motion IN PART.

I. Introduction

In this case, Plaintiffs Maria Ford, Sundae Worthy, and Paige Martin ("Plaintiffs") are asserting wage and hour claims against Defendants Gary Yasuda ("Yasuda") and Amarillo College of Hairdressing, Inc., which does business as the Milan Institute and the Milan Institute of Cosmetology ("Milan") (collectively, "Defendants"). *See FAC*. In the operative First Amended Complaint ("FAC"), Plaintiffs have raised causes of action for: (1) failure to pay a minimum wage, in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206 (against Defendants); (2) failure to pay wages due under California law, in violation of California Labor Code §§ 200, *et seq.*, §§ 1194, *et seq.*, and §§ 1197, *et seq.* (against Milan); (3) failure to pay overtime, in violation of California Labor Code §§ 510, 558, 1194, *et seq.*, and Wage Order No. 2-2001, Cal. Code Regs. tit. 8, § 11020 ("Wage Order No. 2") (against Milan); (4) failure to provide meal and rest periods, in violation of California Labor Code §§ 226.7, 512, and Wage Order No. 2 (against Milan); (5) failure to pay all wages due upon separation from employment, in violation of California Labor Code §§ 201, 202, 203 (against Milan); (6) failure to provide itemized statements, in violation of California Labor Code §§ 226, 1174, 1174.5, and Wage

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Order No. 2 (against Milan); (7) failure to reimburse business expenses, in violation of California Labor Code § 2802 (against Milan); (8) unfair competition, in violation of California Business and Professions Code §§ 17200, *et seq.* (against Defendants); (9) civil penalties, pursuant to the Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 (against Milan); and (10) declaratory relief (against Defendants). *Id.* ¶¶ 68-139.

Plaintiffs seek to represent a nationwide FLSA class of: "all persons nationwide who, on or after October 2010, performed personal services for customers, performed cleaning or support services, or sold or marketed beauty products and/or personal services on behalf of Milan while enrolled at a Milan Institute and/or a Milan Institute of Cosmetology." *Id.* ¶ 40. Plaintiffs also seek to represent a California class asserting state law claims. *Id.* ¶ 52.

Defendants now move to dismiss: (1) Plaintiffs' state law claims, in their entirety; (2) Plaintiffs' unfair competition claim against Yasuda; (3) Plaintiffs' FLSA claim against Yasuda; and (4) Plaintiffs' declaratory relief claim against Yasuda. *Mem.* 1:2-1:14.

II. Background

Milan operates for-profit schools teaching the cosmetology trades: cosmetology, barbering, skin care, makeup artistry, manicuring, and massage therapy. *See FAC* ¶¶ 2, 23. Milan also offers cosmetology services to the public, for a fee, and sells beauty products. *See id.* ¶¶ 3, 23. Yasuda is the president and/or director of Milan, and owns Milan in whole or in part, directly or indirectly. *See id.* ¶ 18.

Milan students perform cosmetology, barbering, and manicure services for Milan's paying clients. *See id.* ¶¶ 6, 29. They also clean, sweep, set up and take down studios, wash and fold laundry, clean pedicure bowls, schedule clients, sell retail products, and promote and market Milan's services. *See id.* ¶¶ 6, 25, 29. Students are not paid for their work. *See id.* ¶ 38.

The services students are required to provide do not necessarily correspond to their education. Specifically, Plaintiffs contend that: (1) students are required to provide services that are outside the scope of Milan's curriculum and students' licensing examinations; (2) customers often do not provide sufficient variation in skills and tasks needed for licensing; and (3) students are required to provide services without regard to whether they need or would benefit from experience in those services. *See id.* ¶ 31. Plaintiffs also allege that Milan fails to provide adequate supervision for students, and that Milan instructors do not know how to perform some of the services students are required to undertake. *See id.* ¶¶ 30-32.

Milan competes with other salons that do not use unpaid student labor. *See id.* ¶¶ 6, 34. Although it charges clients more than a nominal fee, it is able to offer services at a lower cost because students are not compensated for their work. *See id.* ¶¶ 26, 36-67. As a result, Plaintiffs allege that Milan earns more from its salon business than it does in tuition from students. *See id.* ¶ 24.

III. Legal Standard

A motion to dismiss under Rule 12(b)(6) tests whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding a Rule 12(b)(6) motion, the court must accept the facts pleaded in the complaint as true, and construe them in the light most favorable to the plaintiff. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013); *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th Cir. 2009). The court, however, is not required to accept "legal conclusions . . . cast in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

After accepting all non-conclusory allegations as true and drawing all reasonable inferences in favor of the plaintiff, the court must determine whether the complaint alleges a plausible claim to relief. *See Iqbal*, 556 U.S. at 679-80. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

IV. Discussion

A. The Relationship Between Milan and its Students

Defendants' principal argument in this motion is that they are not liable for any violations of California's employment laws, because Milan's students are not its employees. *See Mem.* 7:9-13:8; *Reply* 1:5-8:18. Plaintiffs disagree. *See Opp.* 5:8-13:25.

The California Supreme Court has not specifically addressed the question of whether cosmetology students can be considered employees of their schools. "When the state's highest

court has not squarely addressed an issue, [federal courts] must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises and restatements for guidance." *Alliance for Property Rights & Fiscal Responsibility v. City of Idaho Falls*, 742 F.3d 1100, 1102 (9th Cir. 2013) (quoting *Glendale Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1154 (9th Cir. 2003)).

There are three principal lines of authority relevant to this issue: the text of the Cosmetology Act (the "Act"), Cal. Bus. & Prof. Code §§ 7301, *et seq.*; a 1944 California Court of Appeal decision, *Hutchison v. Clark*, 67 Cal. App. 2d 155; and the California Supreme Court's 2010 decision in *Martinez v. Combs*, 49 Cal. 4th 35.

The Court begins its analysis, as it must, with the statutory framework laid out by the Legislature. The Act establishes four relevant categories of individuals: fully-licensed cosmetologists, apprentices, unpaid externs, and students. Fully-licensed cosmetologists may practice cosmetology. *See* Cal. Bus. & Prof. Code §§ 7320.3, 7349. Apprentices are granted limited licenses, and may "engage in learning or acquiring a knowledge of barbering, cosmetology, skin care, nail care, or electrology, in a licensed establishment under the supervision of a licensee approved by the board." *See* Cal. Bus. & Prof. Code § 7332; *see also* Cal. Bus. & Prof. Code §§ 7333-7336. Unpaid externs—cosmetology students who have completed at least 60 percent of their educations—may work outside their schools, in "cosmetology establishment[s] participating in the education program of the school of cosmetology," in return for course credit. *See* Cal. Bus. & Prof. Code § 7395.1.

California Business & Professions Code § 7349 makes it unlawful to employ individuals for cosmetology work if those individuals are not licensed (*i.e.* fully-licensed cosmetologists or appropriately-licensed apprentices) or externs:

> It is unlawful for any person, firm, or corporation to hire, employ, or allow to be employed, or permit to work, in or about an establishment, any person who performs or practices any occupation regulated under this chapter and is not duly licensed by the bureau, except that a licensed cosmetology establishment may utilize a student extern, as described in Section 7395.1.
>
> Any person violating this section is subject to citation and fine pursuant to Section 7406 and is also guilty of a misdemeanor.

However, the Act exempts certain individuals from its licensing strictures. Most notably for the purposes of this case, "Students engaged in performing services on the public while enrolled in a school approved by the board shall not be required to be licensed under this chapter if they perform those services at the approved school in which they are enrolled." Cal. Bus. & Prof. Code § 7319.5. The Act also includes exemptions for: medical professionals; the armed services; the theatrical, radio, television, and movie industries; individuals working outside licensed establishments without compensation; salespeople recommending, demonstrating, or selling cosmetology products; and the correctional system. *See* Cal. Bus. & Prof. Code § 7319.

Under the Act, students may qualify to take the cosmetology licensing examination by graduating from a cosmetology school. *See* Cal. Bus. & Prof. Code § 7321(d)(1). To graduate, students must, among other things, complete 1600 hours of "technical instruction and practical training covering all practices constituting the art of cosmetology." *See* Cal. Code Regs. tit. 16, § 950.2(a); Cal. Bus. & Prof. Code §§ 7316, 7362(b). "Technical instruction" consists of "instruction by demonstration, lecture, classroom participation, or examination." Cal. Code Regs. tit. 16, § 950.2(b). "Practical training," on the other hand, is the time spent on a "practical operation," which is "the actual performance by the student of a complete service on another person or on a mannequin." *Id.* Students must undergo both technical instruction and practical training: for example, students must complete 65 hours of technical instruction in hair dressing, and 240 practical operations. *See* Cal. Code Regs. tit. 16, § 950.2(b)(1).

The Act is silent as to whether students must or may be compensated for work they perform within their cosmetology schools.

Defendants contend that issue was settled by the California Court of Appeal in *Hutchison v. Clark*, when the court invalidated an Industrial Welfare Commission ("IWC") order requiring cosmetology schools to pay students who had completed at least 1250 hours of their education. *See* 67 Cal. App. 2d at 156, 161. The Court of Appeal reasoned that the Act treated individuals attending cosmetology schools as students, not employees, and concluded that "[t]here is nothing in the act to suggest the relationship of employer and employee." *Id.* at 159; *see also id.* at 161 ("the status of student and the absence of any relationship of employer and employee is determined by statute."). In the course of that analysis, the court relied on the principle that there was a bright-line demarcation between students and employees: "those attending [cosmetology] schools are either students or they are not students; they are either employees or they are not employees, during the period of their attendance." *Id.* at 160.

Plaintiffs argue that the California Supreme Court implicitly overruled *Hutchison* in *Martinez v. Combs*, 49 Cal. 4th 35 (2010). The central issue in *Martinez* was the proper definition of the term "employer" for the purposes of California Labor Code § 1194, California's minimum wage and overtime statute. *See id.* at 49. The Court conducted a detailed analysis of § 1194 and unanimously concluded that the "Legislature intended the IWC's wage orders to define the employment relationship in actions under [§ 1194]." *See id.* at 52. The Court chronicled the expansion of the IWC's powers by the Legislature and amendments to the California Constitution, and explained that "[t]he Legislature and the voters have repeatedly demanded the courts' deference to the IWC's authority and orders." *Id.* at 60, *see id.* at 53-57, 60-62. The Court also reasoned that it was bound to enforce the definitions articulated in the IWC's wage orders because "an employee who sues to recover unpaid minimum wages under section 1194 actually sues to enforce the applicable wage order. Only by deferring to wage orders' definitional provisions do we truly apply section 1194 according to its terms by enforcing the 'legal minimum wage.'" *Id.* at 62 (citation omitted).

Under IWC Wage Order No. 14, the order at issue in *Martinez*, "'[e]mploy' means to engage, suffer, or permit to work, and '[e]mployer' means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." *Id.* at 48 n.9 (citations omitted). Section 18 of the Labor Code defined a "person" as "any person, association, organization, partnership, business trust, limited liability company, or corporation." The Supreme Court interpreted those definitions to mean that the IWC had promulgated three alternative definitions of employment. "It means: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." *See Martinez*, 49 Cal. 4th at 64.

After *Martinez*, *Hutchison* is no longer good law. *Hutchison* was based on the assessment that there was a bright line between students and employees that limited the reach of the IWC. *See Hutchison*, 67 Cal. App. 2d at 159-61. That reasoning is incompatible with *Martinez*'s holding that the IWC has the authority to *define* what constitutes employment for the purposes of California's minimum wage and overtime laws. Further, *Hutchison*'s clear delineation between students and employees cannot be squared with the more expansive definition of employment established by the IWC.

Based on *Martinez*, the Court concludes that the California Supreme Court would hold that Milan's students may be properly classified as its employees, if they are within the definition of "employment" established by the IWC.

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In this case, the relevant IWC Wage Order is Wage Order No. 2, which applies to the "personal service industry," including "schools of beauty culture offering beauty care to the public for a fee[.]" *See* Cal. Code Regs. tit. 8, § 11020(1), (2)(J). Wage Order No. 2 uses the same definitions of "employ" and "employer" as Wage Order No. 14. *See* Cal. Code Regs. tit. 8, § 11020(2)(D), (F). Accordingly, Milan's students are covered by Wage Order No. 2 if Milan: "exercise[s] control over [their] wages, hours or working conditions"; "suffer[s] or permits [students] to work"; or engages the students to work. *See Martinez*, 49 Cal. 4th at 64. The FAC adequately alleges that Milan's students fall within the scope of at least two of those definitions. The FAC shows that Milan exercises control over its students' wages (or more specifically, their lack thereof) and working conditions. *See FAC* ¶¶ 23, 25, 27-32, 38. The FAC also indicates that Milan suffers or permits its students to work. *See id.*; *Martinez*, 49 Cal. at 70 (explaining that the "basis of liability" under the "suffer or permit" standard is "the defendant's knowledge of and failure to prevent the work from occurring") (citations omitted).

Two of Plaintiffs' state law claims do not clearly arise under or reference Wage Order No. 2. *See FAC* ¶¶ 96-101 (failure to pay all wages due upon separation from employment), ¶¶ 107-109 (failure to reimburse business expenses). However, Defendants have not argued that the California Supreme Court would interpret "employment" differently for the purposes of California Labor Code §§ 201, 202, 203, and 2802 than it would under Wage Order No. 2. Accordingly, the Court finds that the IWC definition applies.

Defendants have raised a number of other arguments in an attempt to bolster their claim that *Hutchison* is still good law and bars Plaintiffs' state law claims. The Court does not find any of those arguments persuasive.

Defendants contend that classifying students would effectively force them to violate the law. Cosmetology schools must provide students with practical training, and Defendants seem to think that if their students were found to be employees, they could not provide that training without violating § 7349. That concern is unfounded. Defendants are overlooking § 7319.5, which provides that: "Students engaged in performing services on the public while enrolled in a school approved by the board shall not be required to be licensed if they perform those services at the approved school in which they are licensed."

Defendants cite two documents published by the Department of Labor Standards Enforcement (DSLE), which enforces the IWC's wage orders: a pamphlet discussing different IWC classifications, and the DLSE's enforcement manual. *See* DLSE, *Which IWC Order?:*

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Classifications (March 2013)[1]; DLSE, *The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (Revised)* ("DLSE Manual") (March 2006).[2] The pamphlet specifically states that "[s]tudents in schools of beauty culture offering beauty care to the public for a fee" are exempt from Wage Order No. 2. *See* DLSE, *Which IWC Order?: Classifications*, at 11; *see also id.* at 14. However, the pamphlet does not offer any analysis or reasoning to support its conclusion, and specifically notes that "courts are not required to follow the classifications of occupations listed herein." *Id.* at 2. The DLSE Manual is less specific, and merely states that: "Students who perform work in the course of their studies, as part of the curriculum, are not employees if they receive no remuneration or credit toward school fees." *See DLSE Manual* § 43.6.8. The Manual does not offer any analysis, and in any case was issued well before the Supreme Court expanded the definition of "employment" in *Martinez*. Further, the Supreme Court specifically noted in *Martinez* that "we give the DLSE's current enforcement policies no deference because they were not adopted in compliance with the Administrative Procedure Act." *See Martinez*, 49 Cal. 4th at 50 n.15. The Court does not find either DLSE publication persuasive.

In addition, Defendants cite an April 7, 2010 DLSE opinion letter regarding an internship program teaching information technology and job skills. *See DLSE Opinion Letter re: Educational Internship Program* ("DLSE Letter").[3] In that letter, the DLSE cited *Hutchison* for the proposition that "California courts long ago recognized that the power of the Legislature and IWC to establish minimum wages of employees contemplates existence of an employment relationship in order for the minimum wage law to apply," and noted that under *Hutchison*, "cosmetology students in training are not employees subject to IWC Order 2." *DLSE Letter* at 1-2. However, the DLSE Letter was issued before *Martinez*, which was decided on May 20, 2010 and modified on June 9, 2010. *See Martinez*, 49 Cal. 4th 35. As a result, it is not surprising that the DLSE Letter does not discuss the continued viability of *Hutchison* in light of the evolution of California's employment law, and it is obvious that the DLSE Letter cannot provide any guidance concerning *Hutchison*'s continued validity after *Martinez*. DLSE opinion letters are not entitled to deference, but may be adopted if courts independently determine that their positions are correct. *See Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 563 (2007). Here, the DLSE Letter does not offer any persuasive reasoning to support its assertion that *Hutchison* is good law, and, more importantly, does not contain any opinion about

[1] Available at http://www.dir.ca.gov/dlse/WhichIWCOrderClassifications.pdf.
[2] Available at http://www.dir.ca.gov/dlse/dlsemanual/dlse_enfcmanual.pdf.
[3] Available at http://www.dir.ca.gov/dlse/opinions-/2010-04-07.doc.

Martinez's impact on *Hutchison*. Accordingly, the Court declines to accord the DLSE Letter any weight in its analysis.[4]

Defendants also suggest that the Wage Order No. 2 may not be in effect, because the IWC is no longer operating. *See Reply* 5:14-5:17. Defendants are wrong: the California Supreme Court has held that although the Legislature defunded the IWC in 2004, its wage orders are still effective. *See Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1102 n.4 (2007).

Finally, Defendants argue that the Court should follow a 1968 decision of the Colorado Supreme Court, which interpreted Colorado law and invalidated an order from the Industrial Commission of Colorado that would have required Colorado beauty schools to pay their students wages. *See Indus. Comm'n of Colo. v. Am. Beauty College, Inc.*, 167 Colo. 269 (1968). That decision addressed a different statutory framework, and was not governed by the analysis laid out in *Martinez*. As a result, it has no bearing here.

In reaching the conclusion that Milan's students are covered by California's wage and hour laws, the Court is mindful that its "fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." *See Martinez*, 49 Cal. 4th at 51 (quoting *Day v. City of Fontana*, 25 Cal. 4th 268, 272 (2001)). The text of the Act is silent as to whether cosmetology students must be paid for work they perform for the fee-paying public in the course of their training. However, the text of the Act is silent regarding the employment status of *most* of the individuals it addresses, including fully-licensed cosmetologists, apprentices, and the various categories of individuals who are exempt from the

[4] The DLSE Letter did not categorically hold that interns are not employees. Instead, it applied the *Portland Terminal* test used by the Department of Labor to determine whether trainees are subject to the FLSA. *See DLSE Letter* at 3-5. That analysis does not appear to be applicable here. The *Martinez* court explained that "the IWC's 'employer' definition belongs to a set of revisions intended to distinguish state wage law from its federal analogue, the FLSA." *Martinez*, 49 Cal. at 59. As a result, the scope of the employment relationship is broader under California law than it is under the FLSA. Further, Milan's students are not trainees as that term is generally used in *Portland Terminal* cases, as they are not being prepared for future employment at Milan. *See Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1005-06 (N.D. Cal. Nov. 5, 2010) (applying *Portland Terminal* test to sales representatives who were not compensated for a three-day training period). However, the Court does not need to resolve the question of whether the *Portland Terminal* test applies here, as Defendants do not argue that its application would lead to the dismissal of Plaintiffs' state law claims.

Act's licensing requirements. As a result, the Court infers that the Legislature intended individuals' employment status to be governed by California's generally-applicable body of employment law, unless the Act specifically provides otherwise. The Legislature has only seen fit to specifically address the employment status of two groups in the Act: unpaid externs, and individuals working outside licensed establishments without compensation. *See* Cal. Bus. & Prof. Code §§ 7319(d), 7395.1. Thus, the employment status of cosmetology students is left to be determined by California employment law.

At the time *Hutchison* was decided, the law embraced a clear distinction between students and employees, and the authority of the IWC was limited. *See Hutchison*, 67 Cal. App. 2d at 159-61. The law has changed. The Legislature and the people of California have significantly expanded the scope of the IWC's authority, and the California Supreme Court has adopted a much broader definition of "employment." *See Martinez*, 49 Cal. 4th at 53-62, 64. Nothing in the language of the Act suggests that the Legislature intended to cement the *Hutchison*-era status quo against those changes.

In conclusion, the Legislature has specified that two categories of individuals may practice cosmetology without being paid: unpaid externs, and individuals working outside licensed establishments without compensation. *See* Cal. Bus. & Prof. Code §§ 7319(d), 7395.1. The Legislature could have carved out a similar provision for students performing services within their schools for the fee-paying public. It chose not to. This Court cannot and will not usurp the Legislature's role by rewriting the Act.

Defendants' overarching motion to dismiss Plaintiffs' state law claims is DENIED.

B. Plaintiffs' Unfair Competition Claim Against Yasuda

Plaintiffs allege that Yasuda is liable for unfair competition, as a joint employer of Milan's students.[5] *See Opp.* 14:1-17:1.

The IWC's broad definition of "employer" means that an employee may have multiple employers. *See Martinez*, 49 Cal. 4th at 59 ("[P]hrased as it is in the alternative (*i.e.* 'wages, hours *or*, working conditions), the language of the IWC's 'employer' definition has the obvious

[5] Plaintiffs claim in their opposition brief that they have asserted a PAGA claim against Yasuda. *See Opp.* 14:1-14: 11. They are incorrect. The FAC only asserts a PAGA claim against Milan. *See FAC* ¶¶ 115-129.

utility of reaching situations in which multiple entities control different aspects of the employment relationship."). However, the "IWC's definition of 'employer' does not impose liability on individual corporate agents acting within the scope of their agency." *Id.* at 66 (quoting *Reynolds v. Bement*, 36 Cal. 4th 1075, 1086 (2005)). As a result, Plaintiffs can sue Yasuda as an employer only if they plausibly allege that he acted as an employer in his individual capacity, rather than as an agent of Milan. *See Iqbal*, 556 U.S. at 679-80.

The FAC does not sufficiently plead that point. The only portions of the FAC that specifically address Yasuda are the allegations that: (1) he "is the president and/or director of Milan"; (2) he "is an owner, in full or in part, of Milan," either directly or indirectly; and (3) he and Milan directly or indirectly "exert control over the activities of the Milan schools and salons." *See FAC* ¶¶ 18-19. None of the substantive allegations in the FAC detail anything Yasuda has done in his individual capacity, rather than as the "president and/or director of Milan." *See id.* ¶¶ 20-139. As a result, there is nothing more than a "sheer possibility" that Yasuda has acted as an employer. *See Iqbal*, 556 U.S. at 678. Such vague allegations do not state a plausible claim to relief. *See id.*

None of the contrary cases cited by Plaintiffs are relevant to the question of whether Plaintiffs have satisfied their pleading burden. *See Opp.* 14:23-15:22. *Guerrero v. Superior Court*, 213 Cal. App. 4th 912, 925-26 (2013), was not decided under the *Twombly/Iqbal* standard, and the federal cases offered by Plaintiffs either concern motions for summary judgment or trial decisions. *See Carrillo v. Schneider Logistics Trans-Loading & Distribution, Inc.*, No. 2:11-cv-8557-CAS(DTBx), 2014 WL 183965 (C.D. Cal. Jan. 14, 2014) (partial summary judgment); *Garcia v. Bana*, No. C 11-02047 LB, 2013 WL 621793 (N.D. Cal. Feb. 19, 2013) (trial); *Arredondo v. Delano Farms Co.*, 922 F. Supp. 2d 1071 (E.D. Cal. 2013) (trial); *Lazaro v. Lomarey, Inc.*, No. C-09-02013 RMW, 2012 WL 566340 (N.D. Cal. Feb. 21, 2012) (trial); *Rodriguez v. SGLC, Inc.*, No. 2:08-cv-01971-MCE-KJN, 2012 WL 5704403 (E.D. Cal. Nov. 15, 2012) (summary judgment); *Gonzalez v. Millard Mall Servs., Inc.*, No. 09cv2076-AJB(WVG), 2012 WL 727867 (S.D. Cal. Mar. 6, 2012) (summary judgment).

Further, the only cited federal case that is factually similar to the dispute here does not support Plaintiffs' position. In *Lazaro*, Defendant Patrick Corrigan was the sole principal of Defendant Lomarey, Inc., and set up its payment procedures. *See Lazaro*, 2012 WL 566340, at *1, 7. However, the court reasoned that "he did so in his capacity as an officer or agent of Lomarey . . . and thus [had] no personal liability for the failure to pay plaintiffs their overtime wages." *Id.* at * 7 (citing *Reynolds*, 36 Cal. 4th at 1087-88).

The other cases are factually inapposite. *Garcia* involved two individual defendants who did business as Ideal RV & Trailer Supply, but Ideal RV & Trailer Supply was not a separate legal entity. *See Garcia*, 2013 WL 621793, at *1-2. *Rodriguez* involved corporate entities and individual defendants, but the discussion of California law only considered whether the two corporate entities were joint employers. *See Rodriguez*, 2012 WL 5704403, at *12-13. And there were no individual defendants in *Carrillo*, *Arredondo*, or *Gonzalez*. *See Carrillo*, 2014 WL 621793, at *1; *Arredondo*, 922 F. Supp. 2d at 1073-74; *Gonzalez*, 2012 WL 727867, at *1.

Accordingly, Plaintiffs' eighth cause of action against Yasuda for unfair competition is DISMISSED, with leave to amend.

C. Plaintiffs' FLSA Claim Against Yasuda

Plaintiffs also allege that Yasuda is individually liable for violations of the FLSA, because he was "an executive and owner of [Milan] with the power to control the terms and conditions of Plaintiffs' employment." *See Opp.* 17:4-17:7.

"[T]he definition of 'employer' under the FLSA is not limited by the common law concept of 'employer,' but 'is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes.'" *Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9th Cir. 1999) (quoting *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983)). Accordingly, "[w]here an individual exercises 'control over the nature and structure of the employment relationship,' or 'economic control' over the relationship, that individual is an employer within the meaning of the [FLSA], and is subject to liability." *Id.* at 1012 (quoting *Bonnette*, 704 F.2d at 1470). To determine whether an individual can be held liable under the FLSA, courts look to four factors: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324 (9th Cir. 1991) (internal quotation marks and citation omitted); *see Lambert*, 180 F.3d at 1012 (approving district court's jury instruction).

With that framework in mind, the conclusory allegations of control set out in the FAC are insufficient to support a plausible claim to relief. The FAC alleges that:

> Named Plaintiffs are informed and believe that Defendants Milan and Yasuda, either directly or through intermediaries that they own or that report to them, exert

> control over the activities of the Milan school and salons including decisions regarding day-to-day employment matters such as whether to or not to pay the Named Plaintiffs and other student-employees, the salon hours of operation, the hours of work for full and part time student-employees, student-employee discipline, and student-employee attire and appearance.

FAC ¶ 19. Based on this vague claim, the Court cannot gauge what Yasuda controls, as opposed to what Milan controls, and cannot evaluate several of the factors articulated by the Ninth Circuit. As a result, the FAC does not meet the *Twombly/Iqbal* pleading standard, because the Court cannot determine whether Plaintiffs have stated a plausible claim to relief. *See Iqbal*, 556 U.S. at 678.

As above, the contrary cases cited by Plaintiffs do not show that they have adequately pleaded their claim. In the sole case Plaintiffs have identified that involved a motion to dismiss, "[t]he defendants [did] not challenge their status as employers under the FLSA." *See Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009). The other two cases cited by Plaintiffs involved a trial and a motion for summary judgment, respectively. In *Lambert*, "[t]he evidence . . . strongly support[ed] the jury's determination that both [individual defendants] exercised economic and operational control over the employment relationship . . . and were accordingly employers within the meaning of the [FLSA]." *See Lambert*, 180 F.3d at 1012. In *Guifu Li v. A Perfect Day Franchise, Inc.*, the court held that there was a genuine issue of material fact concerning whether two of a company's officers and directors were employers for the purpose of the FLSA, because there was evidence showing that they hired and supervised employees. *See Guifu Li v. A Perfect Day Franchise, Inc.*, 281 F.R.D. 373, 398, 400 (N.D. Cal. Mar. 19, 2012) (summary judgment). However, the court granted summary judgment for another officer and a branch manager, because the plaintiffs did not offer sufficient evidence showing that they had control over employees. *See id.* at 398-99. None of these cases suggest that the vague allegations of control set out in the FAC are enough to state a claim.

Accordingly, Plaintiffs' first cause of action against Yasuda for violation of the FLSA is DISMISSED, with leave to amend.

D. Plaintiffs' Declaratory Relief Claim Against Yasuda

Plaintiffs' declaratory relief claim against Yasuda is premised on his status as an FLSA employer. *See FAC* ¶¶ 130-139. Because, as explained above, the FAC does not adequately allege that Yasuda was an employer for the purposes of the FLSA, that claim fails.

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Plaintiffs' tenth cause of action against Yasuda for declaratory relief is DISMISSED, with leave to amend.

E. Leave to Amend

The Court generally grants leave to amend any dismissed claims unless it is clear that they could not be saved by any amendment. *See United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011); *Thinket Ink Info. Res., Inc. v. Sun Microsys., Inc.*, 368 F. 3d 1053, 1061 (9th Cir. 2004). The Ninth Circuit has instructed that the policy of giving leave "when justice so requires," as set forth in Federal Rule of Civil Procedure 15(a), "is to be applied with extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). In determining whether leave to amend is warranted, the Court considers: (1) a party's bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility; and (5) whether the plaintiff has previously amended its complaint. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).

Here, four of the five factors weigh in favor of granting leave to amend: there are no indications that Plaintiffs are acting in bad faith; allowing Plaintiffs to amend their pleading will not result in undue delay or prejudice Defendants; and it does not appear that amendment would be futile. Although Plaintiffs have previously amended their pleadings, they have not done so in response to a ruling from this Court. Under the circumstances, the Court finds it appropriate to GRANT leave to amend.

V. Conclusion

For the reasons above, Defendants' motion is GRANTED IN PART and DENIED IN PART.

(A) Plaintiffs' first cause of action against Yasuda, for violation of the FLSA, is DISMISSED, with leave to amend;

(B) Plaintiffs' eighth cause of action against Yasuda, for unfair competition, is DISMISSED, with leave to amend;

(C) Plaintiffs' tenth cause of action against Yasuda, for declaratory relief, is DISMISSED, with leave to amend.

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Defendants' motion is otherwise DENIED.

Plaintiffs may file a Second Amended Complaint ("SAC") consistent with this opinion no later than **August 29, 2014**. If Plaintiffs do not file a SAC by that date, the three causes of action above will be dismissed **with prejudice**.

IT IS SO ORDERED.